Supreme Court, U.S.
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No. 98-1486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,

Petitioner,

v.

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Five

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

I. THIS IS NOT AN APPROPRIATE CASE FOR THIS COURT TO RESOLVE CONFLICTS ON ORAL MODIFICATIONS OF COLLECTIVE BARGAINING AGREEMENTS.

The Petition is correct that there is a division of authority between the federal circuits concerning oral modifications of collective bargaining agreements. However, this is not an issue of significance in the federal courts, as implicitly admitted in the Petition where it is described as a "rare . . . opportunity to review this important area of law." (Petition, pages 6-7). Contrary to the Petition, this Court should devote its resources to resolving issues which occur frequently, or which are currently the source of division between federal circuits on significant issues. This Court need not reach out for the "rare" opportunity to resolve an issue.

Petitioner argues that the federal Courts of Appeal have proven incapable of achieving consistency on this area of the law. In fact the Courts of Appeal of at least three federal circuits have been able to achieve consistency on the basis of the ruling and reasoning of the Ninth Circuit in *Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*, 597 F.2d 1269 (9th Cir. 1979) ("Hawaii Teamsters"). That decision has been cited with approval and followed in *Merk v. Jewel Food Stores*, 945 F.2d 889, 895 (7th Cir. 1991); *Eastern Air Lines v. Air Line Pilots Ass'n*, 861 F.2d 1546, 1555 (11th Cir. 1988); *N.L.R.B. v. Deauville Hotel*, 751 F.2d 1562, 1569, fn. 10 (11th Cir. 1985); *Local 1316, I. Bro. of E.W. v. Superior C. & A.*, 608 F. Supp. 1246, 1250 (N.D. Ga. 1985) .

The only court which has refused to follow the majority rule of *Hawaii Teamsters* is a divided panel of the Court of Appeal for the District of Columbia Circuit in *Martinsville Nylon Employees v. N.L.R.B.*, 969 F.2d 1263 (D.C. Cir. 1992). As noted in the decision of the Court below (App. 11, *et seq.*), all other Courts of Appeal have essentially followed the dictates of the United States Supreme Court and interpreted a collective bargaining agreement as an industrial charter permitting flexibility in administration and permitting case-by-case adjudication of proposed modifications or amendments. It is

only the D.C. Circuit in one panel opinion which has achieved an inconsistent result. The fact that this issue has minimal significance to lower courts is illustrated by the fact that the D.C. Circuit's opinion and holding that CBAs must be rigidly interpreted and oral modifications prohibited has **not been cited by a single other Circuit**, either with approval or disapproval. *Martinsville* was decided in 1992, and the Court below was the first case to review its holding. The issue hardly requires resolution by this Court.

The current division between the federal Courts of Appeal may be resolved by the D.C. Circuit revisiting the majority holding in *Martinsville*. It is entirely possible that, at that time, the D.C. Circuit will adopt holdings in accord with the prevailing view in the Seventh, Ninth, and Eleventh Circuits and will follow the reasoning of the dissenting opinion of Judge Wald in *Martinsville* and the California Court in this case.

This Court may, in the future, find it appropriate to resolve the conflict between the D.C. Circuit and the various other federal circuits which have followed the *Hawaii Teamsters* rule **if** another federal circuit decides to follow *Martinsville*, or if a state court of last resort elects to follow *Martinsville* when the federal circuit for that state has elected to follow *Hawaii Teamsters*. In those situations potential conflict and incentive to forum shopping would arise. At this time the controlling decisions, even though in conflict, do not encourage forum shopping, and there is no reason for this Court to devote its scarce resources to resolving a dispute which is not causing problems in the lower courts.

It also seems probable that those federal circuits which have not yet addressed the issue will elect to follow the reasoning of *Hawaii Teamsters* and the dissent of Judge Wald in *Martinsville*. The California court, applying its independent judgment as to which line of authority should control, found the reasoning of *Hawaii Teamsters* more consistent with federal labor policy (App. 13). It is submitted that this Court, if called upon to address the issue, will reach the same conclusion. However, it would be premature for this Court to address that issue at this time, rather than awaiting future appellate decisions which may eliminate the conflict.

As noted by the Court below (App. 13, *et seq.)*, the goal of the federal labor laws is to achieve "industrial peace." *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967). The decision of the Court below also cited with approval Judge Wald's dissent in *Martinsville*, which in turn relied on Justice Goldberg's concurring opinion in *Humphrey v. Moore*, 375 U.S. 335 (1964), in which Justice Goldberg wrote:

> There are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties.

Id. at page 353-354.

The flexible view of collective bargaining agreements, adopted by the Ninth Circuit and the Court below, is also consistent with this Court's decision in *John Wylie & Sons v. Livingston*, 376 U.S. 543 at 550 (1963), where the Court stated: "[A] collective bargaining agreement is not an ordinary contract." In opposition to that holding of this Court, the D.C. Circuit in *Martinsville* purported to apply ordinary contract principles, and more specifically the UCC principles, even though such rigid analysis is inconsistent with numerous decisions of this Court. In fact, the rationale of the majority in *Martinsville* also implicitly disregards this Court's earlier holding that:

> [A] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts.

[*Consol. Rail Corp. v. Railway Labor Executives*, 491 U.S. 299, 311 (1989), internal quotation marks omitted.]

II. THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO REVIEW THE ROLE OF SECTION 8(d) OF THE NLRA IN CONTRACT ACTIONS.

The Petition, on Issue No. 2, clearly fails to meet the requirements of Rule 10 of this Court. The Petition fails to demonstrate any conflict

between courts, or any conflict between the decision of the Court below and controlling federal law. This request is utterly frivolous.

The court below carefully analyzed this issue and concluded that, applying controlling federal law, the purported 8(d) defense could not be asserted in this contract action (App. 20, *et seq.*). As the Court noted, a violation of the provisions of § 8(d), if established, would constitute an unfair labor practice. The Court below followed the decision of the Seventh Circuit in *N.L.R.B. v. Local 554*, 991 F.2d 1302 (7th Cir. 1993), in holding that a midterm modification, and particularly one between two employer associations, is not covered by the notice requirements of § 8(d). On the basis of that controlling authority, the Court below noted: ". . . it is not at all clear that MCA committed an unfair labor practice in this case." (App. 23) The court went on to hold that the NLRB has exclusive jurisdiction to adjudicate disputes involving alleged unfair labor practices, relying upon this Court's decision in *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 83 (App. 23).

The Petition at page 16 argues that the decision below would encourage "forum shopping" because "otherwise valid NLRA violations" could not be raised in Court. The flaw in GBA's reasoning is the assumption that both parties would have to agree to initiate Board proceedings. That is manifestly incorrect. Under the ruling of the Court below, and consistent with this Court's repeated rulings regarding "primary jurisdiction," either party would have the opportunity to file charges before the Board and thus to obtain a ruling on the NLRA violations from the entity possessing that expertise. Alleged NLRA violations should be brought before the Board, the entity designated by Congress for that purpose and the entity which has the expertise on those issues. GBA's position essentially seeks to involve both state and federal courts in matters within the exclusive jurisdiction of the Board.

GBA's inversion of priorities and logic is carried forward on page 17 where, in footnote 13, GBA makes the absurdist argument that MCA should be penalized because GBA failed to file a charge with the Board. GBA's footnote fails to explain why it should be rewarded for failing to file a ULP asserting that MCA had violated Section 8(d) of the Act.

As the court below noted (App. 20): "The unstated implication is that MCA's alleged violation of Section 8(d) is an unfair labor practice under the NLRA." Under those circumstances, GBA could have asserted its 8(d) defense by filing a ULP. Having failed to exercise its right to file a ULP and obtain a Board determination, GBA is now in no position to argue that federal or state courts should waste valuable judicial resources by rewarding parties such as GBA for sitting on their rights.

The court below (App. 24, *et seq.*) also answered GBA's argument that this case is an appropriate vehicle to analyze offensive versus defensive use of the NLRA (Petition, page 15). Prior decisions of this Court have made clear that the courts cannot be called upon to enforce contract provisions which are themselves illegal under substantive provisions of the NLRA, such as Section 8(e). On the other hand, it is the exclusive province of the Board, not the courts, to enforce the procedural provisions of the NLRA, as distinguished from the substantive provisions. *See* analysis of controlling authorities at App. 23-24.

CONCLUSION

For all of the foregoing reasons the Petition should be denied.

Respectfully submitted,

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